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No. 585

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

FEDERAL POWER COMMISSION, *Petitioner*

vs.

AMERADA PETROLEUM CORPORATION

and

SIGNAL OIL AND GAS COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Respondent Signal Oil and Gas Company's Brief in Opposition

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As late as 1961 the Chief Justice, writing for this Court, warned that if the Federal Power Commission should attempt action calculated to expand its own jurisdiction by forcing all gas transactions into regulated channels, then "we would be forced to agree that the Commission had overstepped its bounds."[1] The Commission's effort to lead this Court into the prejudgment of the case at bar by a decision in the pending *Lo-Vaca* case[2] not only obscures the significant differences in the legal developments of the two cases but is calculated to deprive the Court of the revelation

[1] *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1, 23 (1961).
[2] *FPC v. Lo-Vaca Gathering Co. et al*, Nos. 46, 47, and 57, this Term.

of the Commission's calculated effort to expand its own jurisdiction by just such action. That these are not extravagant charges of over-zealous counsel must be apparent from the same studied observation made just one year ago in October by the United States House of Representatives Appropriations Committee when it reported:

> "The Commission is spending too much time in empire building and *trying to expand its jurisdiction.*"[3]

The petition for certiorari herein (FPC Pet.) reveals only part of the important judicial history of the case at bar, carefully omitting the Commission's refusal to honor the final mandate of the United States Court of Appeals. The case involves an assertion of FPC jurisdiction over gas produced in North Dakota and sold to serve North Dakota communities. The Commission has compelled this respondent to litigate the same issue *twice* before the Court of Appeals and, being unsuccessful there in its demand for greater regulatory power, it now seeks, by urging that the issue be resolved in *Lo-Vaca* and while our case is held in abeyance, to summarily foreclose this respondent without the right to be heard even *once* in this Court. In that posture we respectfully plead, not just for our client's interests but to the end of the soundest possible decision by this Court, that, unless certiorari is promptly denied, we may at least be heard before our cause is judged.

[3]Report No. 824, Committee on Appropriations, Independent Offices Appropriation Bill, 1964, p. 9 (October 7, 1963). All emphasis in this brief is added for clarity of presentation.

OPINIONS BELOW

The *second* opinion of the Court of Civil Appeals for the Eighth Circuit is reported at 334 F. 2d 404 (1964) and is set out as Appendix A to the FPC Pet. in this cause. The *first* opinion of that same court deciding the same issue for these same parties is reported at 247 F. 2d 173 (1957).

QUESTIONS PRESENTED

Because the decision of the court below rests on two independent bases, there are two questions, a proper answer to either of which merits denial of the FPC Pet. Despite the clear admonition of Rule 23 that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court," the initial decisive question is not even presented for review by the FPC Pet. The court below, having in 1957 decided the same issue for the same parties, correctly held that the Commission could not now relitigate the question simply because its appointed membership had changed:

> "In our former opinion *we fully adjudicated and decided the same issue* recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and *that decision as between these parties bars resurrection of the issue again.*"[4]

[4] *Signal Oil and Gas Company v. F. P. C.*, 334 F. 2d 404, 412 (8th Cir. 1964), FPC Pet. 27.

This judicial holding vindicated the position taken administratively by two members of the Commission who wrote herein in their dissenting opinion with reference to the Eighth Circuit's 1957 decision:

> "*That case involved the identical issue presented here and was litigated by the identical parties as those before us now.* * * * *Thus the jurisdictional question has been decided by* this Commission and *the 8th Circuit Court of Appeals.* Surely we are not free to re-examine or reverse each prior decision with the advent of every change in the makeup of the Federal Power Commission. *We are bound by* our own decision and the mandate of the *North Dakota* decision *under the doctrine of res judicata.*" (R. 260-1).

Since the holding on this first question fully supports the decision of the court below and since it is not presented for review by the FPC Pet., it is unnecessary for this Court to reach the second question.[5] The petition for certiorari should be denied at the outset since, no matter which way the second question would be resolved by this Court, the action would not affect the judgment of the court below as it would stand fully supported by the first holding.

Only if relitigation were permitted would it be appropriate to reach the second question. In that event, the second question would be found unfairly stated in the FPC Pet. The Commission's argumentative phrasing of it is best seen by contrasting its loaded question

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[5] *Republic Natural Gas Company v. State of Oklahoma*, 334 U.S. 62, 72 (1948); *Letulle v. Scofield*, 308 U.S. 415, 419 (1940); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947).

with the more candid statement by the court below:

Question as stated by the Commission (FPC Pet. 2)	*Question as stated by the 8th Circuit (FPC Pet. 18)*
"When a supplier sells natural gas to an interstate pipeline company, which commingles it with gas from other sources and uses some of the mixture for local sales, but sells the bulk of the mixture in interstate commerce, may the supplier and pipeline avoid the jurisdiction of the Federal Power Commission over sales in interstate commerce for resale by stipulating, contrary to the physical fact, that all of the supplier's gas sold under that contract will be consumed within the State?"	"[The issue is] whether or not gas produced, transported, sold, and consumed in North Dakota is divested of its non-jurisdictional properties because during a segment of its journey, it becomes fungibly commingled in a common pipeline with gas destined for resale in interstate commerce."

We respectfully adopt the statement of that question by the Court of Appeals as a fair and objective presentment. For the lack of those qualities we reject the Commission's statement of the question.

STATEMENT OF THE CASE

Contrary to the impression sought to be left by the Commission's "Statement" (FPC Pet. 3-8), this case does *not* involve sales of gas in fact made in interstate commerce but fictionally described as being made for consumption in the state of origin. Rather it presents a Commission effort, *sua sponte*, to seize control over sales of North Dakota gas actually and honestly made for resale and consumption in North Dakota since 1955 — and to do so simply because the gas is transported from a North Dakota field to the North Dakota communities by a pipeline which also transports gas

sold for resale outside North Dakota. The realities of the delivery and control of this intrastate gas are that it has been physically measured both at the in-put and outlet points by means that are unquestionably sound from an engineering point of view and in complete fidelity to the governing contractual provisions. There is no fiction or artificiality involved here. (R. 3-4, 158). The two members of the present Commission who joined in the effort to take jurisdiction over intrastate sales will recognize authority in the producing state over gas sold for consumption in that state only if an *entirely separate pipeline* is built to transport the intrastate gas. (FPC Pet. 24). The statute of course describes no such jurisdictional dichotomy, nor as pointed out by the court below, does common sense:

> "We cannot fashion our decision on such an onerous and illogical result that would necessitate the building of a parallel pipeline with its attendant expense, inevitably to be borne by the rate payers, to say nothing of the waste of natural resources during the interim." (FPC Pet. 24).

A candid statement of the case, not to be found in the FPC Pet., discloses the crucial facts to be just that simple.

In 1955 Signal Oil and Gas Company (Signal) as the owner and operator of a natural gas processing plant at Tioga, North Dakota, had residue gas for sale[6]. Signal produces no gas in North Dakota but obtains it by purchase or as a processing fee from

[6]Six years later Amerada purchased a fifty percent interest in the plant but Signal continues to operate it. (R. 23-4).

numerous North Dakota producers. (R. 192). Montana-Dakota Utilities Company (MDU) operates a pipeline from which it serves gas consuming areas within the State of North Dakota as well as other areas outside the State of North Dakota. (FPC Pet. 12-13).

On July 18, 1955, Signal and MDU entered into a "firm gas" contract by which Signal agreed to make deliveries of stated quantities to MDU *for resale to the communities served in North Dakota.* Several weeks earlier Amerada had entered into a similar contract with MDU. No application was filed with the F.P.C. to make sales under the "firm gas" contract because it provided for sales of gas for resale within the same state and hence not subject to federal jurisdiction under the Natural Gas Act.

On July 19, 1955, Signal and MDU entered into a contract for the sale of "dump gas" to be used by MDU in consuming areas outside the State of North Dakota. Amerada had made a similar "dump gas" contract. An application was filed with the F.P.C. for a certificate to make interstate sales under the "dump gas" contract. At the hearing on that application held in 1955-6 the North Dakota Public Service Commission intervened and contended that the F.P.C. had jurisdiction even over the sales for resale in the same state because of the physical commingling of the intrastate gas in a pipeline with interstate gas. The Commission through its Staff recognized that gas is a fungible commodity and accordingly took the sound position that mere commingling, where there are sepa-

rate transactions and quantitative product separation, does not destroy the nonjurisdictional status of Signal's North Dakota gas sold for resale in North Dakota.[7]

The fact that this intrastate sale was not entrusted by the Congress to FPC regulation was so clear that the Examiner saw no room for intelligent difference of opinion on that point. He ruled that the Commission "clearly" had no jurisdiction over the sales made to supply North Dakota markets because "it has no authority to regulate *intrastate* sales." Observing that commingling during transportation "does *not* convert the * * * contracts into interstate contracts," the Examiner wrote:

> "The conclusion that they are accordingly intrastate sales is *so obvious as to require no extended discussion.*"[8]

A unanimous Commission adopted that reasoning and affirmed that result.[9]

From that Commission order North Dakota appealed to the United States Court of Appeals for the Eighth Circuit. The same counsel who appears in the case at bar as Solicitor for the Commission also appeared in 1957 before the Eighth Circuit in a similar capacity. Referring to decisions of this and other courts he solemnly counseled — but completely contrary to the position he now takes here — as follows:

"For those decisions make it *plain* that the

[7]This factual history is recounted in *State of North Dakota v. F.P.C.*, 247 F. 2d 173 (8th Cir. 1957).
[8]*In Re Montana-Dakota Utilities Company*, 16 FPC 401, 408-9 (1956).
[9]Id. at 415.

> indistinguishable commingling of jurisdictional and nonjurisdictional gas in delivery is *not* sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction."[10]

The Eighth Circuit, likewise respecting the established legal principles governing the handling of fungible goods, reached the same conclusion:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity *because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered* before any portion of the gas stream has left the State of North Dakota."[11]

Three years later Signal entered into a "firm gas" contract with MDU to supply markets outside North Dakota, a sale admittedly subject to the jurisdiction of the F.P.C. (R. 39). At about the same time it revised its contractual terms for sales of gas to serve North Dakota communities by making changes which essentially increased the volumes to be delivered in order to permit service to other North Dakota communities not previously served. (R. 15, 154). By the time Signal applied for a certificate to make deliveries under the new interstate contract, which was dated January 16, 1961, there had been new appointees to the Federal Power Commission and three of them, two of whom still remain on the Commission, had flatly repudiated the decision of the Eighth Circuit, refused to follow

[10]Brief of the Federal Power Commission, p. 10, *State of North Dakota v. FPC*, 247 F. 2d 173 (8th Cir. 1957).

[11]*State of North Dakota v. FPC*, 247 F. 2d 173, 177 (8th Cir. 1957).

it, and asserted jurisdiction over sales of gas even for resale in the same state whenever it is transported in a pipeline that also carries interstate gas. This "attempt to aggrandize the scope of its jurisdiction"[12] first appeared in the *Lo-Vaca* case. After disparaging the wisdom of the Eighth Circuit with the comment that

> "The *North Dakota* case presents the most serious problem of distinction. Whether or not that case was rightly decided is an open question,"[13]

the new Commissioners proceeded to brush aside the judicial authority of that court with the back of their hand:

> "To the extent that *North Dakota* may be inconsistent with the action **WE** take here, we believe it was erroneously decided."[14]

This expressed Commission attitude was more than faintly reminiscent of the description given by the late James M. Landis to then President Elect John F. Kennedy of the Commission's ". . . attitude, *substantially contemptuous*, of refusing in substance to obey the mandates of the Supreme Court of the United States and other federal courts."[15]

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[12] *Federal Power Commission v. Transcontinental Gas Corporation*, 365 U.S. 1, 24 (1961).

[13] *In Re Lo-Vaca Gathering Company*, 26 FPC 606, 614 (1961)

[14] Id. at 614-15.

[15] "Report on Regulatory Agencies to the President Elect", submitted by James M. Landis and printed by the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate, p. 55 (1960).

At the hearing upon Signal's application to certificate its 1961 interstate contract, the Commission *on its own initiative* asserted jurisdiction over the sales by Signal to MDU to serve North Dakota communities.[10] It was not in the least dissuaded by an outstanding final judgment of the United States Court of Appeals holding these same sales to be nonjurisdictional in a case in which these same parties were before that court. In a 3 to 2 opinion the Commission simply "overruled" the Eighth Circuit and disregarding its mandate to the contrary, proceeded to hold Signal's sales of North Dakota gas to serve North Dakota communities to be subject to federal regulation. The parties were all parties to the former case; the sellers were the same; the buyer was the same; the statutory limits on the Commission's jurisdiction were the same; the issue was the same; only the members constituting the Commission had changed.

Signal's appeal followed back to the Eighth Circuit which, in a *carefully reasoned opinion*, unanimously reversed the Commission on two independent grounds:

> *First*, that the judicial decision of the jurisdictional issue in an earlier case between the same parties "bars resurrection of the issue again" (FPC Pet. 27), and
>
> *Second*, that gas sold for resale in the state of its production is not a sale in interstate commerce

[10] In contrast, the North Dakota Commission, although participating in the hearing below, respected the Eighth Circuit's prior adjudication and did not urge, as it had before the *court* ruled in 1957, that there was federal regulatory authority over this intrastate sale. In fact no one was urging the F.P.C. to assert jurisdiction here. They did it entirely on their own.

> even though the transportation facilities utilized to move it from field to market are also made available for the transportation of interstate gas fungibly commingled with the intrastate volumes.

Contrary to the assurance given this Court (FPC Pet. 8) that the Eighth Circuit in so ruling "relied largely upon the reasoning of the Fifth Circuit in the *Lo-Vaca* case, *supra*, now pending on writs of certiorari, Nos. 46, 47, and 57, this Term," it is perfectly apparent from a reading of the Eighth Circuit's opinion that it relied upon its own prior decision and upon its own good judgment respecting the applicable law. In fact, before the Fifth Circuit ever heard of the *Lo-Vaca* case, the Eighth Circuit had unequivocally concluded with respect to the same sales involved in the case at bar:

> "The transactions in question covered gas produced, transported, sold and consumed entirely within the State of North Dakota. They do not constitute interstate commerce in any sense of the word."[17]

It is the second point in this Eighth Circuit decision which the Commission now seeks to have reviewed on certiorari without bringing before this Court the other and independent ground on which the lower court's decision rests.[18]

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[17] *State of North Dakota v. Federal Power Commission*, 247 F. 2d 173, 178 (8th Cir. 1957).

[18] The Commission contents itself with asserting in a footnote on page 10 of its petition that it "reserves the right to argue that the court below erred in holding that the Commission was collaterally estopped" by the prior adjudication. Surely that type of casual reference is not compliance with Rule 23 of this Court which requires all questions

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because it is nothing more than an untimely petition to review the final 1957 decision of the Eighth Circuit. The appointment of new personalities to the Commission does not alter that conclusion, and the fact that the Commission has completely reversed the position it took in the former case is *a fortiori* support for it. Neither Signal nor any other litigant should be subjected to the abuse of repeated reopening and retrial of decided issues because the individuals exercising administrative authority decide they would like to expand their jurisdictional spheres. There must be an end to the burdens of litigation.

The Court of Appeals Correctly Refused to Permit Relitigation of Its Final Judicial Determination

This Court has clearly recognized that a regulated party has the same right as the administrative agency to rely on the conclusiveness of judicial determinations:

> "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. *The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court* to the same extent that

necessary to a reversal to be presented in the petition and specifically directs that only such questions as are set forth in the petition "will be considered by the Court." Such attempts to raise an issue by mere reference to it in the argument have consistently been held insufficient. *Herbring v. Lee*, 280 U.S. 111 (1929); *Mazer v. Stein*, 347 U.S. 201, 206 n. 5 (1954).

> other litigants may rely on judgments for or against them . . . . *there must be an end to disputes* which arise between administrative bodies and those over whom they have jurisdiction."[19]

The Court of Appeals for the Eighth Circuit in 1957 decided, for the benefit of both the Commission and Signal, that Signal's sales of gas in North Dakota to MDU to serve North Dakota markets were not subject to federal regulation even though commingled by MDU in a pipeline containing gas moving in interstate commerce. Since that decision became final, neither party has any right to impose upon the other the burden of retrying the issue previously determined. Only the judiciary can protect a party from the harassment of such repetitive litigation. This Court has well said:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, *a collateral attack upon the decision* **as to jurisdiction** *there rendered merely retries the issue* previously determined."[20]

The Commission had its "day in court" with full opportunity to present its "view of the law" and that ended the matter. The fact that the jurisdictional issue decided by the Eighth Circuit for these parties

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[19] *International Union v. Eagle-Picher Mining and Smelting Company*, 325 U.S. 335, 340, 341 (1945).

[20] *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

in 1957 is the *same issue* which the Commission now seeks to relitigate cannot be seriously questioned. After hearing the argument in far greater detail than we are constrained to impose upon this Court in this response, the Eighth Circuit said, "In our former opinion we fully adjudicated and decided the *same issue* * * *." (FPC Pet. 27).[21]

Of course the finality of judicial decisions involving administrative agencies does not crumble with each change of the administrators:

> "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in *relitigation of the same issue between that party and another officer of the government.* See Tait v. Western Maryland R. Co., 289 US 620, 77 L ed 1405, 53 S Ct 706. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."[22]

Nor does the fact that the issue sought to be relitigated is one of jurisdiction make its determination a transitory exercise for, as this Court has said, "* * * the principles of res judicata apply to questions of jurisdiction as well as to other matters—whether it

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[21]The Commission's superficial effort to claim that the issue was different from that decided in the earlier case is so completely answered by the opinion of the court below (FPC Pet. 21-25), that it would be an imposition on this Court to add further argument on the point.

[22]*Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381, 402 (1940).

be jurisdiction of the subject matter or of the parties."[23]

Surely the Commission cannot avoid the binding effect of the 1957 Eighth Circuit decree by the expediency of its own inconsistency. The estoppel of the prior determination is not lessened simply because the Commission, *as the court below noted*, "has now retreated from previous agreement with the rationale of *Peoples Natural Gas Co.* when it argued in *State of North Dakota v. Federal Power Commission* that intrastate gas does *not* lose its nonjurisdictional status when commingled with interstate gas in a common pipeline." (FPC Pet. 21). Precisely the converse is true:

> "Normally, if such an issue, *albeit, concerning the jurisdiction of the tribunal itself*, has once been decided between the parties by a competent court, another court will not permit the matter to be relitigated between the same parties in another case. Stoll v. Gottlieb, 1938, 305 U.S. 165, 59 S.Ct 134, 83 L.Ed. 104; Sherrer v. Sherrer, 1948, 334 U.S. 343, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429. This rule of repose is *doubly justified* in the rare case in which the party who won on an issue in the first case attempts to obtain a contrary ruling in the second litigation, as the railroads are trying to do here. . . . Res judicata should and does apply."[24]

Indeed it is doubtful that the Commission has the legal

[23] Id. at 403.

[24] *Seatrain Lines, Inc. v. Pennsylvania R. Co.*, 207 F. 2d 255, 259 (3rd Cir. 1953).

right to the flip-flop which it seeks to make:

> "It is a well-settled rule based upon the principle of estoppel, which is sometimes applied in determining the effect of a judgment, that a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits."[25]

As recently as 1958 this Court rebuked other efforts to relitigate an issue which had been determined by the Court of Appeals on review of an order *from the Federal Power Commission*, characterizing them as "impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by, the final judgment of the Court of Appeals."[26] In holding that the issue could not be tried a second time this Court said:

> "We think these recitals show that the very issue upon which respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment.[27]

The fact that the volume of gas to be delivered by Signal to serve North Dakota markets was increased in 1961 renders no significant change in the issue so as to permit a United States agency the luxury of relitigating it:

> "The United States may not relitigate the same issue in successive libel proceedings involving *different quantities* of the same product (George H.

[25] 2 Freeman on Judgments, §631 (1925).
[26] *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958).
[27] Id. at 339.

> Lee Co. v. United States, 9 Cir., 41 F.2d 460), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same."[28]

The fact that Signal's sales of North Dakota gas to serve North Dakota communities are not made in violation of federal regulations is an issue which was laid at rest in the 1957 litigation:

> "The question whether the respondent had sold the commodities in violation of the federal regulation, having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations."[29]

The Commission Improperly Seeks to Aggrandize the Scope of Its Jurisdiction

The reason for the Commission's about-face is quite apparent. The court below, recognizing it as a rather transparent effort of an administrative agency to enlarge its own jurisdiction, aptly responded:

> "Congress, not the contracts, has exempted the Commission's jurisdiction in this instance. Neither the Commission nor this Court has the authority to expand the Commission's jurisdiction." (FPC Pet. 25).

In a very penetrating Law Review article by Professor John Paul Sullivan of the George Washington University Law School, the Commission's unashamed re-

[28] *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583, 586 (8th Cir. 1940).

[29] *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38 (1950).

pudiation of the Court of Appeals decision is characterized as "a high point of administrative self-assurance." That author observes that if the enlargement of jurisdiction by reason of commingled transportation stands, then "state jurisdiction has been cut away to virtually nothing and absolutely nothing will soon be left."[30] With reference to the decision of the Commission in the *Lo-Vaca* case, since reversed by the Fifth Circuit and now before this Court, Professor Sullivan goes on to say:

> "That this decision [of the Commission, not of the Fifth Circuit] is simply bad law is perhaps clear, but the matter goes far beyond an abstract conclusion of law. Its error is that it makes the distinction between 'affecting interstate commerce' and 'in interstate commerce' meaningless."[31]

If it were not obvious at the time, that the Commission's repudiation of the Eighth Circuit's judgment was nothing more than an effort to arrogate unto itself more and more power, subsequent developments have certainly made it obvious. In 1961 this Court had before it a direct sale from a producer to an end user and a transportation contract by an interstate pipeline company. Although obviously there was a commingling of the gas during transportation with gas sold for resale in interstate commerce, this Court properly reasoned that the arrangement "does *not*

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[30]Sullivan, "Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation", 30 George Washington Law Review 638, 676 (1962).

[31]Id. at 678.

entail a sale for resale in interstate commerce."[32] At the time the Commission wrote its decision in *Lo-Vaca* it was not yet ready to assert jurisdiction over all transactions involving commingling and thus to repudiate *this* Court's own 1961 decision. To avoid that conclusion, which would inevitably follow from the "commingling logic" being used by the Commission to extend its jurisdiction, the *Lo-Vaca* opinion contained this self-imposed limitation:

> "In reaching this conclusion, we are cognizant of the fact that there exists in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources . . . It is not our intention by this opinion to disturb such transportation arrangements."[33]

But even that limitation is now falling under the onslaught of the Commission's jurisdictional march. Thus in its brief currently on file in this Court in *Lo-Vaca* (No. 57, this Term) at page 22 there is a footnote asserting that the producer's sale in the field before this very Court in *FPC v. Transcontinental Gas Corporation* and clearly treated by this Court as non-jurisdictional was *really* "subject to the Commission's jurisdiction" after all.

The climax of this grasping for administrative power is found in the very recent action of the Commission in a case now pending before it and to which

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[32] *Federal Power Commission v. Transcontinental Gas Corporation*, 365 U.S. 1, 4 (1961).

[33] *In Re Lo-Vaca Gathering Company*, 26 FPC 606, 611 (1961).

we refer since it is a public record.[34] In that case Texaco made a transportation contract with Transcontinental for the purpose of taking Texaco's own gas from fields in the Southwest to New Jersey for use in Texaco's own refinery.[35] Of course no one even contended that, by entering into a transportation contract to permit its own use of its own gas, Texaco had made a *sale* to a third party in interstate commerce. But subsequent to the Examiner's decision on the application to certificate the transportation arrangement, the Commission in an order issued August 25, 1964, intimated that it would try to assert jurisdiction over Texaco's gas transported for its own use by inviting argument on the following issue raised by it — admittedly *sua sponte:*

> "Whether the arrangement between Texaco and Transco involves a sale of gas by Texaco to Transco for resale by the latter so that the *producer* should be required to secure a certificate."[36]

Incredible though it may seem, the Commission, through its Staff, has responded to that invitation with a brief filed in that Docket on October 12, 1964, wherein, starting with the insupportable "commingling logic" by which it had repudiated the Eighth Circuit's judgment, it *now* asserts jurisdiction over Texaco's

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[34] *In Re Transcontinental Gas Pipe Line Corporation*, FPC Docket No. CP63-222.

[35] The Examiner's opinion (slip ed. issued June 5, 1964, p. 48) succinctly describes the factual situation as "the transportation of natural gas by a producer through the facilities of an interstate pipeline for consumption in the producer's own refinery • • •".

[36] Order Granting Motion for Oral Argument and Setting Date for Argument, issued August 25, 1964, in Docket No. CP63-222.

right to use its own produced gas:

> "The first *sale* occurs when Texaco delivers the gas to Transco in Texas and Louisiana and the second *sale* occurs when Transco redelivers [sic] approximately equivalent volumes of gas to Texaco in New Jersey. The first sale is subject to the jurisdiction of this Commission because Transco will subsequently resell this gas both to Texaco and to Transco's other interstate customers."[37]

This development illustrates, we believe, that the Commission's appetite for more and more jurisdiction is virtually insatiable. By the "commingling logic" it steamrollered over the final judgment of a United States Court of Appeals to emasculate the statutory requisite for a sale "in interstate commerce." Its Staff at least has now taken the final step, and by the fiction of pretending that a producer who contracts with a pipeline to transport his gas has sold the gas to the pipeline and bought it back at the other end, has emasculated from the statute even the requirement for a "sale."

Though we disagree with its soundness, we do not question the good faith of the Commission in believing that it *should* have jurisdiction over all sales of gas, regardless of whether or not they are made to serve markets in different states. But, as this Court recently took occasion to observe with respect to another administrative agency seeking to "aggrandize the scope of

[37]Brief of Commission Staff on jurisdiction issue, October 12, 1964, pp. 3-4, *Transcontinental Gas Pipe Line Corporation*, FPC Docket No. CP63-222.

its jurisdiction":[38]

> ". . . the determinative question is not what the Board thinks it *should* do but what Congress has said it *can* do."[39]

Even the dissenting Commissioners in *Lo-Vaca* seemed preoccupied with the *legislative* inquiry as to what types of sales *should* be federally regulated but, as explained in Professor Sullivan's scholarly analysis, such an inquiry really misses the point:

> "Commissioner O'Connor dissented in part in an opinion which was somewhat disappointing in that it attacked only the wisdom of the Commission's establishing 'such a broad policy.' By implication there was an admission that the Commission had the power to do what it did. Commissioner O'Connor concluded that:
>
> > It appears to me that the advantages to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers. [26 FPC at 617].
>
> What is most annoying about this statement is that it assumes a power where none exists. Again the wrong question is asked and so the answer, whatever it might be, is beside the point."[40]

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[38]*FPC v. Transcontinental Gas Corporation*, 365 U.S. 1, 24 (1961).

[39]*Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).

[40]Sullivan, Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation, 30 George Washington Law Review 638, 677 (1962).

THE RELATIONSHIP OF THIS CASE TO THE PENDING LO-VACA CASE[41]

The Commission asserts that this case "presents the same question" as *Lo-Vaca* and accordingly requests that its petition herein should await and abide the Court's decision in *Lo-Vaca*. (FPC Pet. 8-11). Perhaps the story briefly outlined above makes it self-evident why the Commission seeks to place this Court in the unsatisfactory position of passing on the "stronger case", with nothing before it but the situation in the "weaker case."[42] The strategy is ingenious but hardly fair to the Court. It is an obvious effort to reach their goal by "hiding the ball." The Commission confusingly assures this Court on the one hand that the Eighth Circuit merely relied on the reasoning of the Fifth Circuit (FPC Pet. 8) and on the other hand with equal positiveness, that the Fifth Circuit merely relied on the reasoning of the Eighth Circuit.[43]

Either the two cases are different or, in fairness to the Court, the facts and legal developments in this case should be before the Court prior to the time it decides *Lo-Vaca*. Two very real differences either exist or appear to exist. In the first place *Lo-Vaca* does not involve the soundness of a United States Court of Appeals's insistence that its final judgment be re-

[41] *FPC v. Lo-Vaca Gathering Company et al*, Nos. 46, 47, and 57, this Term.

[42] No implication is intended that *Lo-Vaca* is weak but realistically the exposure of the Commission's jurisdiction-enlargement purpose is stronger with this case also in view. Part of the relevant facts are hidden from the Court if only *Lo-Vaca* is before it.

[43] Brief for Federal Power Commission p. 27, *FPC v. Lo-Vaca Gathering Company et al*, No. 47, this Term.

spected by an administrative agency. In the second place the issue in *Lo-Vaca* is either different from the situation in this case or it is misstated. The Commission tells this Court that the question in *Lo-Vaca* is "whether the parties to a sale of gas may defeat the Commission's jurisdiction by a contractual stipulation *contrary to the physical facts of gas flow*, that all of the gas will be consumed within the State where the sale took place." (FPC Pet. 8). If that is an accurate statement of the issue in *Lo-Vaca*, then the issue is different here because in the case at bar the gas sold under the North Dakota contracts is delivered for resale in North Dakota and the contracts are not "contrary to the physical facts of gas flow." Indeed the measurement and physical separation of the quantities of gas sold by Signal for resale in North Dakota are scientifically accurate and are completely consistent with the contractual provisions. There is not even any dispute on this point in the record evidence. (R. 3-4 and 158).

CONCLUSION

For the foregoing reasons we request from this Court the following action:

1. That the petition herein be denied on the basis that the issue sought to be raised by the Commission has been finally adjudicated for these same parties in a judicial decree that was properly respected by the court below.

2. That, if the petition herein should be granted, the decision in *Lo-Vaca* be deferred until the Court has the benefit of briefs and argument in this case.

3. That, if certiorari is to be granted herein and *Lo-Vaca* must be decided before our case is heard, that the opinion in *Lo-Vaca*, if this Court should decide to reverse the Fifth Circuit, be carefully confined to those situations involving contracts at odds with the physical handling of the gas and not preclude consideration on the merits of a sale of gas produced, sold, transported, accurately measured and consumed within a single state but fungibly commingled, during a part of its journey, in a common pipeline with gas destined for resale in interstate commerce.

Respectfully submitted,

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